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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

GAMETEK LLC,

Plaintiff.

V.

**FUNZIO, INC., FUNZIO USA, INC.,  
AND GREE INTERNATIONAL, INC.**

## Defendants.

Case No. 3:13-CV-03089-RS

## DEFENDANT FUNZIO'S MOTION FOR ATTORNEYS' FEES

Hearing Date: August 7, 2014

Hearing Time: 1:30 pm

Courtroom: 3, 17<sup>th</sup> Floor, 450 Golden Gate Avenue, San Francisco, CA

Name of Judge: Hon. Richard Seeborg

REDACTED VERSION OF DOCUMENT SOUGHT TO BE SEALED

**CASE NO. 3:13-CV-03089-RS**  
**FUNZIO'S MOTION FOR ATTORNEYS' FEES**

## **NOTICE OF MOTION AND MOTION**

PLEASE TAKE NOTICE that on August 7, 2014 at 1:30 pm in the courtroom of the Honorable Richard Seeborg at Courtroom 3, 17<sup>th</sup> Floor, U.S. Courthouse, 450 Golden Gate Avenue, San Francisco, CA, Defendants Funzio, Inc., Funzio USA, Inc.,<sup>1</sup> and GREE International, Inc. (collectively, “Funzio”) will and do hereby move the Court for an award of attorneys’ fees, including nontaxable expenses, and interest, of \$488,321.76.<sup>2</sup>

This motion is made pursuant to 35 U.S.C. § 285 because this case is “exceptional” as defined under the statute. Gametek LLC (“GT”) asserted a patent that this Court held to be invalid in one of the “rare” instances of dismissal at the pleading stage for lack of patentable subject matter. Not only did GT’s case have no strength, GT litigated this case in an unreasonable manner in an effort to drive up litigation costs for Defendants and force settlement on a low-quality (invalid) patent. For example, GT (1) committed misjoinder by including almost two dozen defendants in a single lawsuit contrary to statute, *see Gametek LLC v. Facebook, Inc.*, No. 12-501 (S.D. Cal. Dec. 7, 2012) (Dkt No. 167) (granting Defendants’ motion to dismiss under 25 U.S.C. § 299); (2) re-filed suit against all Defendants again in the same venue, thus requiring Defendants to file multiple (successful) motions to transfer, *see, e.g., Gametek LLC v. Zynga Inc.*, No. 12-2933 (S.D. Cal. June 3, 2013) (Dkt No. 42-1) (granting Defendants’ motion to transfer venue to the Northern District of California), *Gametek LLC v. Electronic Arts*, No. 12-2927 (S.D. Cal. July 23, 2013) (Dkt No. 59) (same), *Gametek LLC v. Funzio, Inc. et al.*, No. 12-2928 (S.D. Cal. June 28, 2013) (Dkt No. 42) (same), *Gametek LLC v. Crowdstar International Limited et al.*, No. 12-2931 (S.D. Cal. July 25, 2013) (Dkt No. 32) (same); and (3) repeatedly demanded unreasonable discovery. This motion is based on this Notice of Motion and Motion for Attorneys’ Fees, the attached Memorandum of Points and Authorities, the

<sup>1</sup> Funzio USA, Inc. was recently dissolved as part of the acquisition of Funzio, Inc. by GREE International, Inc.

<sup>2</sup> See Declaration of Steven Moore in Support of Funzio’s Motion for Attorneys’ Fees (“Steven Moore Declaration”), at 4; Declaration of Jason Lo in Support of Funzio’s Motion for Attorneys’ Fees (“Jason Lo Declaration”), at 4.

1 Declarations of Steven Moore and Jason Lo and exhibits thereto, and any other evidence or argument  
2 presented by counsel to the Court. Crowdstar International Limited (“Crowdstar”), Zynga Inc.  
3 (“Zynga”), and Electronic Arts Inc. (“Electronic Arts”) (collectively, Defendants) are filing similar  
4 motions seeking attorneys’ fees. Funzio hereby requests to join in Defendants’ motions seeking an  
5 award of attorneys’ fees. A proposed order is included.

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28 CASE NO. 3:13-CV-03089-RS  
FUNZIO’S MOTION FOR ATTORNEYS’ FEES

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1       **I. INTRODUCTION**

2           On April 25, 2014, this Court granted judgment on the pleadings in favor of Funzio because  
 3 GT Gaming f/k/a Gametek LLC's asserted patent is invalid for lack of patentable subject matter. As  
 4 the prevailing party, Funzio seeks attorneys' fees allowed by the patent statute for an "exceptional  
 5 case." *See 35 U.S.C. § 285.*

6           Recently, the Supreme Court removed the constraints the Federal Circuit had imposed on  
 7 District Courts' discretion to award § 285 attorneys' fees and explained that a wider universe of  
 8 scenarios would fall under the statute's definition of "exceptional." In particular, the Supreme Court  
 9 identified two types of cases that would each satisfy the § 285 standard: (1) "one that stands out from  
 10 others with respect to the substantive strength of a party's litigation position (considering both the  
 11 governing law and the facts of the case)" or (2) "the unreasonable manner in which the case was  
 12 litigated." *See Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S. Ct. 1749, 1756 (Apr. 29,  
 13 2014). The Supreme Court held that "exceptional" in the statute has its ordinary meaning: "rare." *Id.*  
 14 Nothing else constrains District Courts from awarding fees under § 285. *Id.*

15           The standard is satisfied here for two independent reasons. *First*, the lack of substantive  
 16 strength of GT's assertion of Patent No. 7,076,445 is shown by this Court's Order invalidating the  
 17 patent at the pleading stage for lack of patentable subject matter. Both this Court and the Federal  
 18 Circuit have noted that such dismissals are warranted only in "rare" cases. *See Gametek LLC v.*  
 19 *Zynga Inc.*, No. 13-2546, at \*4 (N.D. Cal. Apr. 25, 2014) (Dkt. No. 82) (quoting *Ultramercial, Inc. v.*  
 20 *Hulu*, 722 F.3d 1335 (Fed. Cir. 2013)). Further, as the Court recognized, GT provided "no  
 21 meaningful alternative," "no substantive counter-argument," and "no explanation" on the §101  
 22 inquiry in response to Funzio's motion. *Id.* at \*6, 7, 9, 10.

23           *Second*, this case is also exceptional because, in a thinly veiled attempt to force a nuisance  
 24 settlement, GT's improper litigation demands drove up Funzio's costs in defending the litigation. GT  
 25 is a non-practicing entity and subsidiary of the massive patent assertion entity Acacia. As evidenced  
 26 by its litigation conduct, GT's business plan from the start was to purchase a low value (really, no  
 27

1 value) patent at a cheap price, assert that patent against a slew of productive companies spanning an  
 2 entire industry, and drive up litigation costs to extract settlements individually lower than the cost of  
 3 each defendant defending litigation but in the aggregate more than the cost to GT of purchasing the  
 4 patent in the first place. And, the strategy worked. By the time the patent was ruled invalid, GT had  
 5 already extracted individual settlements at well below the average cost of defense from 10 of the  
 6 effectively 14 defendant companies it sued (excluding the four companies GT voluntarily dismissed)  
 7 for an aggregate amount that far exceeds what it paid for the now-invalid patent.

8 GT's attempts to litigate irrespective of the merits of its case and to escalate litigation costs to  
 9 Funzio were replete throughout this litigation such as committing blatant misjoinder and re-filing its  
 10 suit against the same defendants in the same inconvenient venue thus forcing each to move for  
 11 transfer.

12 Another example of GT's improper litigation strategy is its unreasonable discovery requests  
 13 to Funzio. For example, GT's counsel demanded depositions of Funzio witnesses on 75 Rule  
 14 30(b)(6) topics—many of which were not relevant—on multiple accused products on an expedited  
 15 basis. There is simply no rational explanation for GT's discovery demands other than one last effort  
 16 to force settlement discussions by threatening to impose on Defendants substantial litigation costs  
 17 before the Court invalidates the patent. While egregious, GT's actions are not surprising, as GT's  
 18 strategy has never been based on the strength of the '445 patent in the first place.

19 Because GT's actions throughout the litigation forced Funzio to incur unnecessary costs and  
 20 attorneys' fees, Funzio seeks reimbursement in defending against a lawsuit that never should have  
 21 been brought (as GT's assertion of validity of the '445 patent has no substantive strength) and was  
 22 unnecessarily prolonged by GT's unreasonable litigation demands (which GT engaged in to drive up  
 23 Funzio's litigation costs in hopes of forcing Funzio to settle rather than bear the cost of litigation).  
 24 GT should be punished, not rewarded (as it currently stands with several settlement fees based on an  
 25 invalid patent), for its abusive litigation tactics.

26 **II. STATEMENT OF THE ISSUE TO BE DECIDED**

1 Pursuant to Civil L.R. 7-4, the issue to be decided is whether GT's actions in initiating this  
 2 litigation to assert Patent No. 7,076,445 as well as the manner it litigated this case make this an  
 3 "exceptional case" under 35 U.S.C. § 285, thereby justifying an award of reasonable attorneys' fees  
 4 to the prevailing party Funzio.

5 **III. STATEMENT OF THE JUDGMENT, STATUTE ENTITLING FUNZIO TO THE  
 6 AWARD, AND THE AMOUNT SOUGHT**

7 Pursuant to Fed. R. Civ. P. 54(d)(2)(B), the judgment and statute entitling Funzio to an award  
 8 of attorneys' fees is this Court's April 25, 2014 Order Granting Motions For Judgment On The  
 9 Pleadings (Dkt. No. 85) and Judgment (Dkt. No. 86) and 35 U.S.C. § 285. Funzio seeks the amount  
 10 identified in the attached Declarations of Steven Moore and Jason Lo.

11 **IV. BACKGROUND FACTS**

12 GT is a subsidiary of Acacia, a large, publicly-traded, and well-known patent assertion entity.  
 13 See Acacia Research Corporation: About Us, <http://acaciaresearch.com/about-us/> (last visited June  
 14 12, 2014). Acacia claims to be the "industry leader in patent licensing" and touts its "deep legal and  
 15 technology expertise" to "unlock financial value" in patents. *See id.*

16 GT itself is a non-practicing entity, *see Gametek LLC v. Zynga Inc.*, No. 12-2933, at \*5, 7  
 17 (S.D. Cal. June 3, 2013) (Dkt No. 42-1), meaning that it has never provided any products to market.  
 18 See then-Chief Judge of the Federal Circuit Randall R. Rader, Colleen V. Chien, and David Hricik,  
 19 Op-Ed., *Make Patent Trolls Pay in Court*, N.Y. Times, June 4, 2013, at A5 ("Their business plan is  
 20 simple: trolls (intellectual-property lawyers use less evocative terms like 'non-practicing entities' and  
 21 'patent-assertion entities') make money by threatening companies with expensive lawsuits and then  
 22 using that cudgel, rather than the merits of a case, to extract a financial settlement.") (2013 WLNR  
 23 13756999) (Exhibit 1).

24 All within a span of a few months, Acacia purchased the '445 patent, created GT, assigned the  
 25 '445 patent to GT, then (through GT) asserted litigation based on the '445 patent. *See* Agreement  
 26 between Theados Corporation and Acacia Research Group (October 20, 2011) (Acacia purchasing  
 27 the '445 patent) (GAMETEK001405 to GAMETEK001423) (Exhibit 2); Secretary of State Articles

1 of Organization: Gametek LLC (Dec. 14, 2011) (GAMETEK002009 to GAMETEK002010) (Exhibit  
 2 3); Assignment and Assumption Agreement between Acacia Research Group and Gametek LLC  
 3 (Acacia assigning '445 patent to Gametek) (Dec. 19, 2011) (GAMETEK002066 to  
 4 GAMETEK002068) (Exhibit 4). Specifically, Acacia and GT purchased the '445 patent for  
 5 [REDACTED] and recorded the assignment in February 2012, roughly six years after the patent  
 6 issued. *See* Agreement between Theados Corporation and Acacia Research Group LLC  
 7 (GAMETEK001407) (Exhibit 2). To this day, GT's only asset is the '445 patent.

8 That same month, GT filed a single lawsuit against 21 competing mobile game developers,  
 9 online game developers, and social media providers, including Funzio, in the Southern District of  
 10 California, alleging infringement of the '445 patent. *Gametek LLC v. Facebook, Inc.*, No. 12-501  
 11 (S.D. Cal. Feb. 28, 2012) (Dkt. No. 1).

12 The Defendants, including Funzio, filed a motion to dismiss for improper joinder under 35  
 13 U.S.C. § 299. The Court *granted* Defendants' motion and dismissed the case. *Gametek LLC v.*  
 14 *Facebook, Inc.*, No. 12-501 (S.D. Cal. Dec. 7, 2012) (Dkt. No. 167) (Order Granting Motion to  
 15 Dismiss under 25 U.S.C. § 299 and Fed. R. Civ. P. 21).

16 The same day the parties received notice of the dismissal,<sup>3</sup> GT filed a second lawsuit, again in  
 17 the Southern District, asserting the same '445 patent against Funzio. *Gametek LLC v. Funzio, Inc.*,  
 18 No. 12-2928 (S.D. Cal. Dec. 10, 2012) (Dkt. No. 1). Funzio filed a motion to transfer venue to the  
 19 Northern District. The Court *granted* Funzio's motion. *Gametek LLC v. Funzio, Inc.*, No. 12-2928  
 20 (S.D. Cal. June 28, 2013) (Dkt. No. 42).

21 Shortly after the parties exchanged proposed claim constructions, Funzio filed a motion for  
 22 judgment on the pleadings because the '445 patent was invalid under 35 U.S.C. § 101 for lack of  
 23 patentable subject matter. At the April 24, 2014 hearing, this Court gave a tentative ruling in favor of  
 24

25 \_\_\_\_\_  
 26 <sup>3</sup> Though the Order is dated December 7 and the docket entry currently states the same, the Order  
 27 was not entered until December 10 and the parties did not receive the ECF notice until that day.  
 28 *See* Email from ECF to Funzio's counsel (Dec. 10, 2012 1:28 p.m. PT).

1 granting Funzio's motion. The next day, this Court issued an Order granting Funzio's motion and  
 2 entering judgment in favor of Funzio—ending the case. *See Gametek LLC v. Funzio, Inc.*, No. 13-  
 3 3089 (N.D. Cal. Apr. 25, 2014) (Dkt. No. 82).

4 In granting Funzio's motion, the Court observed that “this appears to be the *rare* case in  
 5 which the defendants have met their burden at the pleadings stage to show by clear and convincing  
 6 evidence that the '445 patent claims an unpatentable abstract idea.” *Id.* at \*1-2 (emphasis added).  
 7 This Court cited the Federal Circuit's holding that “it will be *rare* that a patent infringement suit can  
 8 be dismissed at the pleading stage for lack of patentable subject matter.” *Id.* at \*4 (citing  
 9 *Ultramercial*, 722 F.3d at 1338 (emphasis added)). This Court relied on the fact that, in response to  
 10 Funzio's arguments, GT provided “no meaningful alternative,” “no substantive counter-argument,”  
 11 and “no explanation” on the Supreme Court's guideposts in the § 101 inquiry. *Id.*

12 Prior to the Court's invalidation of the '445 patent, GT's litigation campaign against the game  
 13 industry netted settlement agreements with ten defendants out of the fourteen sued. Of the five  
 14 settlement agreements produced by GT to Funzio in this case, no defendant paid more than  
 15 [REDACTED]—far less than a settlement amount reflecting a belief in the strength of a patent and  
 16 far less than the average cost to defend a litigation—yet GT's litigation strategy in the aggregate has  
 17 earned it [REDACTED] in settlement fees. *See* Backflip settlement agreement (GT408000368-  
 18 000375) (Exhibit 5); Playforge settlement agreement (GT408000376-000386) (Exhibit 6); 6Waves  
 19 settlement agreement (GT408000387-000396) (Exhibit 7); NHN settlement agreement  
 20 (GT408000397-000407) (Exhibit 8); Gameview settlement agreement (GT408000586-000596)  
 21 (Exhibit 9). As it stands now, Acacia's settlement fees far exceed the price that it paid for the '445  
 22 patent ([REDACTED]). *See* Agreement between Theados Corporation and Acacia Research Group  
 23 LLC (GAMETEK001407) (Exhibit 2).

24 **V. LEGAL STANDARD**

25 In patent suits, the “court in exceptional cases may award reasonable attorney fees to the  
 26 prevailing party.” 35 U.S.C. § 285. Until recently, the Federal Circuit had imposed heavy  
 27

1 restrictions on what could constitute an exceptional case. But, in April of this year, in *Octane*  
 2 *Fitness*, the Supreme Court changed the standard for what constitutes an “exceptional case” under §  
 3 285 by rejecting those restrictions. The Court held there is “one and only one constraint on district  
 4 courts’ discretion to award attorneys’ fees in patent litigation: The power is reserved for ‘exceptional’  
 5 cases.” *Octane*, 134 S. Ct. at 1755-56. In other words, the “analysis begins and ends with the text of  
 6 § 285.” *Id.*

7 The Supreme Court construed “exceptional” in “accordance with its ordinary meaning”:   
 8 “*rare*.” *Id.* (emphasis added). “In 1952, when Congress used the word in § 285 (and today, for that  
 9 matter), exceptional meant uncommon, *rare*, or not ordinary.” *Id.* (emphasis added; quotation marks  
 10 omitted). The Court explained an exceptional case “is simply one that stands out from others with  
 11 respect to the substantive strength of a party’s litigating position (considering both the governing law  
 12 and the facts of the case) or the unreasonable manner in which the case was litigated.” *Id.*

13 In explaining the new standard, the Supreme Court rejected the Federal Circuit’s prior  
 14 restrictions as “overly rigid.” *Id.* For example, the Federal Circuit’s requirement of “material  
 15 inappropriate conduct related to the matter in litigation, such as willful infringement, fraud or  
 16 inequitable conduct in procuring the patent, misconduct during litigation, vexatious or unjustified  
 17 litigation, conduct that violates Fed. R. Civ. P. 11, or like infractions” actually rose to the level of  
 18 independently sanctionable conduct. *Id.* at 1754. But, as § 285 cannot be superfluous to other fee-  
 19 shifting provisions, the Supreme Court held that § 285 must cover conduct that would *not* otherwise  
 20 rise to independently sanctionable conduct such as under Rule 11 or the Courts’ inherent power to  
 21 deal with “willful disobedience of a court order or when the losing party has acted in bad faith,  
 22 vexatiously, wantonly, or for oppressive reasons.” *Id.* at 1758.

23 Another test the Supreme Court rejected as “too restrictive” is the Federal Circuit’s two-part  
 24 test requiring the litigation be *both* objectively baseless *and* brought in subjective bad faith. *Id.* at  
 25 1757. The Court stated § 285 could cover, for instance, scenarios with only one of those two parts:  
 26 the scenario where the litigation is objectively baseless (but *not* brought in subjective bad faith) and  
 27

1 the scenario where the litigation is (*not* objectively baseless but) brought in subjective bad faith. *Id.*

2 Last, the Supreme Court rejected the Federal Circuit's imposition of a "clear and convincing  
3 evidence" standard of proof for § 285. The statute only recites a "simple discretionary inquiry; it  
4 imposes no specific evidentiary burden, much less such a high one." *Id.* at 1758.

5 The Supreme Court ruling in *Octane Fitness* is consistent with the view that § 285 is a tool to  
6 correct the damage caused by non-practicing entities that plague the court system and productive  
7 businesses. As explained by the then-Chief Judge of the Federal Circuit, the "onslaught of litigation"  
8 brought by non-practicing entities has "slowed the development of new products, increased costs for  
9 businesses and consumers, and clogged our judicial system." *See* Hon. Rader et al., *supra*. And  
10 generally the judicial system provides a strategic advantage for such companies that do not make any  
11 products, because they need not fear a patent infringement counterclaim, need not be concerned with  
12 their employees being distracted from a core business of making products, and "when they lose a  
13 case, after all, they are typically out little more than their own court-filing fees." *Id.*

14 But, § 285 provides a remedy, as explained by the then-Chief Judge: "Section 285 of the  
15 Patent Act, as well as Rule 11 of the Federal Rules of Civil Procedure, give judges the authority they  
16 need to shift the cost burden of litigation abuse from the defendant to the troll." *Id.*; *see also Network*  
17 *Protection Services v. Fortinet*, No. 12-1106, 2013 WL 4479336, at \*1 (N.D. Cal. 2013) (quoting  
18 same). By looking for signs "that a patent lawsuit was pursued primarily to take improper advantage  
19 of a defendant—that is, using the threat of litigation cost, rather than the merits of a claim, to bully a  
20 defendant into settling," judges have "the authority to stop it." *Id.* The Chief Judge ended with the  
21 following exhortation: "We urge them to do so." *Id.*

22 In one of the first decisions awarding § 285 fees following *Octane Fitness*, the S.D.N.Y.  
23 Court embraced its role to deter patent troll litigation and deemed such a case as the "prototypical  
24 exceptional case." *Lumen View Technology v. Findthebest.com*, No. 13-3599, 2014 WL 2440867, at  
25 \*1, 7 (May 30, 2014). The plaintiff in *Lumen*, a "patent holding non practicing entity that acquires  
26 patents and instigates patent infringement lawsuits" and that "appears to be a shell company that is

1 one of a number of related companies involved in litigating patent infringement suits,” asserted a  
 2 computer-implemented method patent. *Id.* The Court invalidated the patent under 35 U.S.C. § 101  
 3 as an abstract idea. *Id.* at \*2.

4 The Court then granted the motion for attorneys’ fees under § 285 because, among other  
 5 things:

6 Lumen’s motivation in this litigation was to extract a nuisance settlement from FTB  
 7 on the theory that FTB would rather pay an unjustified license fee than bear the costs  
 8 of the threatened expensive litigation. Lumen never sought to enjoin FTB from the  
 9 allegedly infringing conduct in its prayer for relief. Lumen’s threats of ‘full-scale  
 litigation,’ ‘protracted discovery,’ and a settlement demand escalator should FTB file  
 responsive papers, were aimed at convincing FTB that a pay-off was the lesser  
 injustice. [*Id.* at \*6]

10 The S.D.N.Y. Court held *Octane Fitness* supported an exceptional case finding because of the  
 11 importance of deterring such predatory suits: “Lumen’s instigation of baseless litigation is not  
 12 isolated to this instance but is instead part of a predatory strategy aimed at reaping financial  
 13 advantage from the inability or unwillingness of defendants to engage in litigation against even  
 14 frivolous patent lawsuits.” *Id.* at \*7. The Court cited as evidence the number of substantially similar  
 15 lawsuits the plaintiff had filed within a short time frame, the boilerplate nature of the complaint, and  
 16 the absence of reasonable pre-suit investigation. *Id.* “The need to advance considerations of  
 17 deterrence of this type of litigation behavior is evident.” *Id.*

18 **VI. ARGUMENT**

19 **1. Funzio is the Prevailing Party**

20 This Court’s April 25, 2014 Order Granting Motions For Judgment On The Pleadings (Dkt.  
 21 No. 82) and Judgment (Dkt. No. 83) make Funzio the prevailing party in this case. GT recovered  
 22 none of the relief sought in its complaint against Funzio. During the meet and confer for this motion,  
 23 GT’s counsel stated it does not dispute that Funzio is the prevailing party. Steven Moore  
 24 Declaration, at 2.

25 **2. This is an Exceptional Case under 35 U.S.C. § 285**

26 This case meets the definition of “exceptional” under § 285. A judgment on the pleadings

invalidating a patent based on lack of patentable subject matter is itself rare and justifies an exceptional case finding, particularly here where GT had no substantive response to Funzio's motion. In addition, GT has litigated in an unreasonable manner to coerce settlements irrespective of the merits of its case, confirming this case is not common.

Despite its patent being ruled invalid, GT and its parent company Acacia have nevertheless had a successful litigation campaign against the game industry. Based on the five settlement agreements produced by GT in this case, GT has profited [REDACTED] more than it paid for the '445 patent. Without a § 285 ruling against it, GT (Acacia) is not the “prevailing party” only in legal terms. Financially, GT will have succeeded, as it has reaped a handsome profit from its business strategy of burdening productive companies, like Funzio, with a cheap (and invalid) patent combined with unreasonable litigation demands.

Section 285 is the tool to stop such harmful behavior. Funzio merely seeks reimbursement for its attorney fees in defending against a lawsuit that should not have been brought at all and was unreasonably litigated by GT to extract an unwarranted settlement. The remedial purpose of § 285 is to compensate Funzio as the prevailing party for fees incurred.

- a. GT's assertion of the validity of the '445 patent lacked substantive strength, as shown by this Court invalidating the patent at the pleading stage, a rare occurrence that satisfies as an exceptional case

As the Federal Circuit recently held, invalidating a patent at the pleading stage for lack of patentable subject matter is a “*rare*” occurrence. *Ultramercial*, 722 F.3d at 1338 (emphasis added).

In granting Funzio's motion in that same scenario, this Court echoed that sentiment: "this appears to be the *rare* case in which the defendants have met their burden at the pleadings stage to show by clear and convincing evidence that the '445 patent claims an unpatentable abstract idea."

<sup>10</sup> See *Gametek LLC v. Zynga Inc.*, No. 13-2546, at \*1, \*4 (N.D. Cal. Apr. 25, 2014) (Dkt. No. 82).

1 (citing *Ultramercial*, 722 F.3d at 1338) (emphasis added).<sup>4</sup>

2 Further, GT had two opportunities—in its opposition brief and at the hearing—to answer the  
 3 fundamental § 101 inquiry: what meaningful limitations exist in the claims in addition to the abstract  
 4 idea? This Court considered those arguments and rejected every one in its detailed Order. In doing  
 5 so, this Court noted GT’s lack of substantive responses to the § 101 analysis. *See id.* at \*6, \*7, \*9,  
 6 \*10 (stating that GT provided “no meaningful alternative,” “no substantive counter-argument,” and  
 7 “no explanation” on the § 101 inquiry).

8 In short, this is a “rare” case and, by definition, is exceptional under § 285. *See Octane*  
 9 *Fitness*, 134 S. Ct. at 1756 (“In 1952, when Congress used the word in § 285 (and today, for that  
 10 matter), exceptional meant uncommon, *rare*, or not ordinary.” (emphasis added)).

11 **b. GT litigated this case in an unreasonable and oppressive manner,  
 12 providing another ground for an exceptional case finding**

13 This case is “exceptional” under § 285 for another, independent reason: GT has litigated this  
 14 action in an unreasonable and oppressive manner, as shown by Funzio’s successful motion to dismiss  
 15 for misjoinder in the original case, Funzio’s successful motion to transfer venue, and Funzio’s  
 16 successful opposition to GT’s motion to compel discovery.

17 **1) GT unreasonably violated the joinder statute, and the Court  
 18 granted Funzio’s motion to dismiss for misjoinder**

19 The joinder statute for patent cases, 35 U.S.C. § 299, is straightforward: “accused infringers  
 20 may not be joined in one action as defendants or counterclaim defendants, or have their actions  
 21 consolidated for trial, based solely on allegations that they each have infringed the patent or patents in  
 22 suit.” Yet, GT originally filed its lawsuit alleging the sole ’445 patent against 21 competing mobile  
 23 game developers, online game developers, and social media providers, and more than a dozen  
 24 different accused products.

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25  
 26 <sup>4</sup> The Supreme Court’s unanimous decision in *Alice Corporation Pty. v. CLS Bank International*,  
 27 No. 13-298 (June 19, 2014), recently confirmed that this Court’s decision is correct.

1 GT's stated basis for joining all Defendants in a single suit was Facebook's purported  
2 involvement in all of the accused products. *See Gametek LLC v. Facebook, Inc.*, No. 12-501 (S.D.  
3 Cal. Feb. 28, 2012), at ¶17. But that allegation had no basis in reality, as shown by (1) the lack of  
4 facts supporting it in the Complaint, *id.*, (2) GT's not filing an opposition to Facebook's motion to  
5 dismiss, *id.* at Dkt. No. 120 (GT Response to Facebook Motion to Dismiss), and (3) GT's dismissal  
6 of Facebook from the case, *id.* at Dkt. No. 119 (GT Notice of Voluntary Dismissal of Facebook).  
7 Moreover, Defendants explained to GT on multiple occasions that GT's suit improperly joined  
8 Defendants in contravention of the joinder statute, but GT chose to ignore the statute's requirements  
9 and press forward. *See, e.g., id.* at Dkt. No. 51 (Answer, at ¶17); Email from Funzio's counsel to  
10 GT's counsel (Apr. 30, 2012, 3:00 p.m. PT) (Exhibit 10); Email from Funzio's counsel to GT's  
11 counsel (May 2, 2012, 11:23 a.m. PT) (Exhibit 11); Email from GT's counsel to Funzio's counsel  
12 (May 3, 2012, 8:12 a.m. PT) (Exhibit 12).<sup>5</sup>

13 As expected, the S.D. Cal. Court dismissed GT's case because of misjoinder, *Gametek LLC v.*  
14 *Facebook, Inc.*, No. 12-501 (S.D. Cal. Dec. 7, 2012), at Dkt. No. 167 (Order Granting Motion to  
15 Dismiss under 25 U.S.C. § 299 and Fed. R. Civ. P. 21), but not before Funzio, among other  
16 Defendants, was forced to incur unnecessary attorneys' fees and costs in researching and drafting a  
17 motion to dismiss.<sup>6</sup>

2) The same day the Court dismissed the misjoined case, GT filed suit in the same venue, and the Court granted Funzio's motion to transfer venue

20 After having its case dismissed because of misjoinder, GT tried to get the same result by filing  
21 complaints against the same Defendants in the same venue (again, S.D. Cal.). Ignoring whether each  
22 Defendant (or even GT itself) actually had ties to the Southern District, GT forced each Defendant to

<sup>5</sup> The law firm of Gibson, Dunn & Crutcher LLP was counsel for Funzio until October 1, 2013. On October 2, 2013, Funzio retained Kilpatrick Townsend & Stockton LLP as counsel in this litigation against GT.

<sup>6</sup> Funzio does not seek fees incurred related to GT's misjoinder because it occurred in the original, dismissed case. These facts are provided to reveal the full story of GT's litigation misconduct.

1 move to transfer venue. Indeed, the Defendants were similarly situated with no meaningful  
 2 connections to the Southern District and successfully moved to transfer venue.

3 Facts either publicly available or known to GT showed that the Defendants did not have  
 4 sufficient ties to the Southern District. For example, the Court relied on in granting Funzio's motion  
 5 to transfer that neither GT, the prosecuting attorneys, nor the alleged inventor of the '445 patent  
 6 reside in the Southern District—all facts within GT's knowledge when it chose to file suit in the  
 7 Southern District. *Gametek LLC v. Funzio, Inc.*, No. 12-2928 (S.D. Cal. June 28, 2013) (Dkt No. 42-  
 8 1). As to Funzio specifically, publicly-available facts (which GT had access to and either knew or  
 9 should have known) show that Funzio's headquarters and only principal place of business are in the  
 10 Northern District of California not the Southern District. *See id.*

11 Moreover, even when the Court started granting Defendants' motions to transfer one-after-  
 12 another, GT refused to reconsider its position. For example, GT argued that each Defendant delayed  
 13 filing its motion to transfer for almost a year. The Court rejected that argument (repeatedly) because  
 14 (1) GT improperly used the original filing date of the misjoined case, from which Defendants were  
 15 dismissed and (2) GT is a non-practicing entity and thus would not lose sales during the pendency of  
 16 the actions. *See, e.g., Crowdstar International Limited et al.*, No. 12-2931, at \*6 (S.D. Cal. July 25,  
 17 2013) (Dkt No. 32); *Gametek LLC v. Zynga Inc.*, No. 12-2933, at \*6-7 (S.D. Cal. June 3, 2013) (Dkt  
 18 No. 42-1); *Gametek LLC v. Funzio, Inc.*, No. 12-2928, at \*6 (S.D. Cal. June 28, 2013) (Dkt No. 42);  
 19 *Gametek LLC v. Electronic Arts*, No. 12-2927, at \*6 (S.D. Cal. July 23, 2013) (Dkt No. 59).

20 GT also argued venue was proper because all of its documents are in the Central District and  
 21 the majority of documents from both sides would be exchanged electronically. Again, the Court  
 22 repeatedly rejected that argument because (1) GT filed its suit in the Southern District and not the  
 23 Central District, (2) GT is a non-practicing entity and is unlikely to have a large number of  
 24 documents to produce, (3) the center of gravity of the dispute is where the Defendant is located, and  
 25 (4) e-documents meant GT also would have no additional burden if the case were transferred. *See,*  
 26 *e.g., Gametek LLC v. Gameview Studios, LLC*, No. 12-499, at \*4 (S.D. Cal. Dec. 4, 2012) (Dkt No.  
 27

47); *Gametek LLC v. RockYou, Inc.*, No. 12-2936, at \*4-5 (S.D. Cal. Mar. 12, 2013) (Dkt No. 26-1); *Gametek LLC v. Zynga Inc.*, No. 12-2933, \*5-6 (S.D. Cal. June 3, 2013) (Dkt No. 42-1); *Gametek LLC v. Funzio, Inc.*, No. 12-2928, \*5 (S.D. Cal. June 28, 2013) (Dkt No. 42); *Gametek LLC v. Electronic Arts*, No. 12-2927, \*5-6 (S.D. Cal. July 23, 2013) (Dkt No. 59); *Gametek LLC v. Crowdstar International Limited*, No. 12-2931, \*5-6 (S.D. Cal. July 25, 2013) (Dkt No. 32).

In short, by the second time—and certainly by the seventh time—the Court rejected GT's arguments, GT knew its arguments were losers but pressed on in any event, thereby needlessly increasing the attorneys' fees and costs to Defendants and the burden on the Court.

3) In almost 50 different instances, GT threatened motions to compel and sanctions for alleged discovery violations despite the lack of any discovery deadline

GT's actions required Funzio, among other Defendants, to incur costs and attorneys' fees in defending against unreasonable discovery demands. Those costs and attorneys' fees should be reimbursed by GT.

Over the course of the litigation, GT threatened a motion to compel in at least twenty-five emails and with respect to at least twelve different discovery categories. *See Email* (Nov. 14, 2012 1:00 p.m. PT) (Exhibit 13); *Email* (Nov. 15, 2012 7:58 a.m. PT) (Exhibit 14); *Email* (Nov. 23, 2012 10:20 a.m. PT) (Exhibit 15); *Email* (Nov. 27, 2012 3:07 p.m. PT) (Exhibit 16); *Email* (Feb. 15, 2013, 3:38 p.m. PT) (Exhibit 17); *Email* (Feb. 18, 2013, 11:31 p.m. PT) (Exhibit 18); *Email* (Feb. 20, 2013, 10:00 a.m. PT) (Exhibit 19); *Email* (Apr. 10, 2013, 5:30 p.m. PT) (Exhibit 20); *Email* (Apr. 10, 2013, 8:51 p.m. PT) (Exhibit 21); *Email* (May 21, 2013 11:00 a.m. PT) (Exhibit 22); *Email* (May 29, 2013, 7:24 p.m. PT) (Exhibit 23); *Email* (May 31, 2013 2:16 p.m. PT) (Exhibit 24); *Email* (July 1, 2013 3:15 p.m. PT) (Exhibit 25); *Email* (Aug. 3, 2013 8:22 a.m. PT) (Exhibit 26); *Email* (Aug. 5, 2013 7:42 a.m. PT) (Exhibit 27); *Email* (Sep. 19, 2013 11:54 a.m. PT) (Exhibit 28); *Email* (Sep. 22, 2013 8:20 p.m. PT) (Exhibit 29); *Email* (Sep. 24, 2013 7:38 p.m. PT) (Exhibit 30); *Email* (Oct. 18, 2013 3:02 p.m. PT) (Exhibit 31); *Email* (Oct. 30, 2013 4:17 p.m. PT) (Exhibit 32); *Email* (Nov. 5, 2013 1:37 p.m. PT) (Exhibit 33); *Email* (Nov. 13, 2013 8:36 p.m. PT) (Exhibit 34); *Email* (Mar. 22, 2014

1 3:57 p.m. PT) (Exhibit 35); Email (Mar. 26, 2014 11:03 a.m. PT) (Exhibit 36); Email (Apr. 11, 2014  
 2 5:29 p.m. PT) (Exhibit 37).<sup>7</sup>

3 GT began its unreasonable discovery demands by serving a convoluted list of 75 30(b)(6)  
 4 deposition topics. *See* Plaintiff's Rule 30(b)(6) Notice to Funzio (Exhibit 38). In a letter from GT's  
 5 counsel to Funzio's counsel dated April 16, 2014, GT threatened to seek sanctions against Funzio  
 6 even after the motion for judgment on the pleadings had been filed and the hearing was fast  
 7 approaching. Letter from GT's counsel to Funzio's counsel (April 16, 2014) (Exhibit 39).<sup>8</sup> Even  
 8 more egregious, GT's counsel alleged that Funzio failed to produce 37 categories of documents,  
 9 many of which were not in its 16 Requests for Production. *See* Plaintiff's First Interrogatories and  
 10 Requests for Production to Funzio (Exhibit 40). In addition, some of the information requested in the  
 11 April 16<sup>th</sup> letter had already been produced by Funzio. Specifically, Funzio had already produced all  
 12 requested financial information and made the source code for the accused games available for  
 13 inspection. Steven Moore Declaration, at 4. However, GT made no effort to arrange an inspection of  
 14 the source code for the accused games. Even after GT demanded that numerous depositions occur as  
 15 quickly as possible (and scoffed at Crowdstar for scheduling these depositions on May 1<sup>st</sup> and May  
 16 2<sup>nd</sup> rather than before) never reviewed the source code prior to the deposition dates. *Id.*

17 Furthermore, despite having Funzio's financial information showing the relative success of  
 18 each accused product, GT refused to prioritize the accused products or drop any from the case, even  
 19 though it could never litigate to trial that many products. Another clear indication of GT's strategy is  
 20 that it pushed to have depositions as soon as possible (which we scheduled for early May) but did not  
 21

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22 <sup>7</sup> Funzio's motion includes references to GT's litigation misconduct against EA, Crowdstar, and  
 23 Zynga. Similarly, EA's, Crowdstar's, and Zynga's motions include references to GT's litigation  
 24 misconduct against Funzio. This is to provide the Court with the full picture of GT's patent  
 25 assertion behavior across an industry as well as because the documents supporting the attorneys'  
 26 fees overlap due to the joint defense group splitting costs.

27 <sup>8</sup> This letter was sent at the request of Crowdstar's counsel during a meet and confer. Due to vague  
 28 allegations of a deficient document production, counsel for Crowdstar requested that GT identify  
 what documents it believed were missing.

1 identify the “missing” documents until April 16<sup>th</sup>. Instead of suggesting that the depositions be  
2 postponed while the purported document issues were addressed, GT suggested that it would just re-  
3 take the depositions at a later date should Funzio produce additional documents. There is no  
4 explanation for this “rush” other than to run up defense costs considering that no fact discovery end  
5 was in sight.

6 **VII. CONCLUSION**

7 For the foregoing reasons, and based on the totality of the circumstances, Funzio respectfully  
8 requests that the Court exercise its discretion to find this case “exceptional” and award Funzio’s  
9 attorney fees of \$488,321.76 in accordance with § 285. Without such a ruling, GT (Acacia) will  
10 profit from its unreasonable litigation conduct in this case and will be incentivized to continue its  
11 (winning) formula in future litigation campaigns.

12  
13 DATED: June 30, 2014

Respectfully submitted,

14 Steven D. Moore  
15 Wab P. Kadaba  
16 Vanessa M. Blake  
17 Rodney R. Miller  
18 KILPATRICK, TOWNSEND & STOCKTON LLP

19 By: /s/ Steven D. Moore

20  
21 Attorneys for FUNZIO

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